IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 26, 2008

STATE OF TENNESSEE v. LISA GAY WILSON

Direct Appeal from the Circuit Court for Blount County
No. C-16039 Michael H. Meares, Judge

No. E2007-02665-CCA-R3-CD - Filed December 5, 2008

The defendant, Lisa Gay Wilson, appeals the sentencing decision of the Blount County Circuit Court ordering that the defendant's sentence be served in confinement. Pursuant to a guilty plea agreement, the defendant pled guilty to theft over $60,000, a Class B felony, and received an agreed upon eight-year sentence, with the manner of service to be determined by the trial court. Following a sentencing hearing, the court ordered that the sentence be served in the Department of Correction. On appeal, the defendant raises the single issue of whether the trial court erred in denying an alternative sentence. After review of the record before us, we affirm the sentence as imposed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee; Raymond Mack Garner, District Public Defender; and Stacey D. Nordquist, Assistant Public Defender, for the appellant, Lisa Gay Wilson.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The defendant worked as the office manager for Wilson Construction Company, a corporation owned by her husband, Richard Wilson, and his partner, Mark Horner. After the defendant left her position, the owners became aware of several irregularities in the company's books, and an audit was done. It became apparent that, although their office was set up to have all accounts paid with computerized checks, the defendant had handwritten checks from an old checkbook and made the checks payable to herself. However, the defendant logged the checks into the company's computer system as payments to vendors. The total amount of checks written to the

defendant in this manner was $205,000. An additional $24,000 in cash was withdrawn by the defendant from the company's bank account. It was also determined that a letter was sent to the bank requesting an additional company credit card be issued in the defendant's name, which was not authorized by either partner. Over $45,000 in unauthorized non-company related expenses were charged to the credit card. It was also established that the defendant had failed to make the IRS deposits for the company's quarterly 941 tax payments, which resulted in the company incurring additional penalties and interest of more than $56,000. Moreover, additional penalties and interest would continue to accrue until the balance was paid in full. The cost of the accountants hired by the company to conduct the audit was $12,925. Finally, during the last month of the defendant's employment as the office manager, sixty-nine checks were returned for nonpayment, resulting in charges of $1863. According to Horner, after a certain point, they decided to stop the investigation, so he was unable to give an amount of the actual loss caused by the defendant's taking of company funds.

Based upon the above, the defendant was indicted by a Blount Count grand jury for one count of theft over $60,000. The defendant accepted a plea agreement, which included an agreed eight-year sentence but left the determination of the manner of service and amount of restitution to the trial court. A sentencing hearing was held at which multiple witnesses testified, including Mark Horner, Richard Wilson, two friends of the defendant, her mother, her daughter, a former co-worker at Wilson Construction Company, and the defendant herself.

Both Horner and Richard Wilson related that the strain caused by the defendant's theft of company funds had placed the business in serious peril. Horner testified that the company owed vendors $360,000 and that there was no money in the bank. Both partners stated that they had considered filing bankruptcy but had eventually worked out payment plans and personally borrowed money in an attempt to keep the business solvent. Wilson testified that he had been married to the defendant for twenty-seven years prior to their divorce after the defendant's activities were discovered. Both Wilson and Horner acknowledged that they were aware of the defendant's past problems with regard to money and overspending and that she had a prior conviction for embezzlement from Citizens Bank where she had been employed. However, Wilson stated that he believed the defendant had changed prior to his hiring her as the office manager and that he did so in order to rebuild his trust in his wife after she begged him to allow her to work in the office. Neither Horner nor Wilson ever checked the company's books to see that they were in order, although Horner related that they did ask the defendant if everything was in order when an employee came to him and expressed concerns. Neither Horner nor Wilson was able to say with certainty how the money taken by the defendant was used. Wilson testified that when he and his wife separated, he also discovered that the defendant had also not been paying the family's personal bills.

Two friends, who had known the defendant for a number of years, were called to testify on her behalf and stated that they were aware that the defendant had a long history of problems with money management. Beverly Williams testified that the defendant was very generous and helpful and that she would often buy things for other people. She stated that spending money made the defendant happy and claimed that the defendant needed professional help. Patricia Hall testified that

the defendant had bouts of depression but that she was open, caring, and a wonderful mother. Hall stated that the defendant had a mental problem and could not stop overspending.

The defendant also called her mother to testify. She stated the defendant had experienced problems with money her entire life, saying that she "would spend every penny she had." She testified that the defendant had been admitted to a mental hospital for treatment and counseling on previous occasions. According to her mother, the defendant had come to them on multiple occasions to borrow money when she had incurred credit card debt of which Richard Wilson was unaware. The twenty-two-year-old daughter of the defendant and Richard Wilson also testified. She stated that she was close to her mother and that it was her mother who had gotten her and her sister what they needed when they were children. She testified that her father was emotionally distant and verbally abusive to the defendant.

Tessa Sparks, a coworker of the defendant at the construction company and friend of the family, testified that she worked in the office from November 2002 to January 2004. She was aware of the defendant's problems with spending and her mental health issues. She stated that at some point during her employment, she spoke with Horner when she began to suspect problems with the company's billing statements.

The forty-eight-year-old defendant was the final witness to testify. She gave testimony regarding her childhood and indicated that her mother was verbally and emotionally abusive to her. She stated she married the first man she dated and that he also verbally abusive to her. She indicated that it was a loveless marriage in which she was always begging for her husband's attention.

The defendant testified that she had always had problems with spending and compared it to an addiction such as alcoholism. She stated that she suffered mood swings and was manic depressive. According to her, she was happy when she was spending money, indicating it was her way of getting "high." She testified that she took the money from Wilson Construction Company because she was lonely and depressed. She stated that she started by taking small amounts, but, when no one noticed, she began taking larger amounts of money. She indicated that she used the money for her herself and her family. She disputed the amount of money which Horner and Wilson claimed was taken. She further testified that she was now working for $8 per hour and would only be able to pay $50 per month in restitution until her circumstances changed.

The defendant acknowledged that she had a prior conviction for theft which resulted from her taking money from her previous employer, Citizens Bank. As a result of the conviction, she was given supervised probation and made restitution. She also acknowledged that she had a second conviction for theft which occurred after she had left Wilson Construction Company, based upon her taking money from a subsequent employer. After pleading guilty to the second charge, the defendant stated that she became extremely depressed and suicidal, began therapy, and was prescribed medication, which she was currently taking.

After hearing the evidence presented, the trial court found that the defendant was not an appropriate candidate for an alternative sentence and ordered that the eight-year sentence be served in the Department of Correction. Moreover, the court set the amount of restitution to be paid by the defendant at $15,000, based upon the defendant's ability to pay, but noted that the company's actual loss was approximately $319,000. Following that decision, the defendant filed the instant timely appeal.

Analysis

On appeal, the defendant raises the single issue of whether the trial court erred in ordering that her sentence be served in confinement rather than imposing an alternative sentence. Initially, we note that although the defendant's crimes occurred during a period between July 1, 2002 and April 30, 2005, she was not sentenced until November 20, 2007. Effective June 7, 2005, our legislature amended several provisions of the Sentencing Reform Act of 1989. Although the defendant was sentenced after the effective date of the amended provisions, there is nothing in the record before us which indicates that she elected to be sentenced under the provisions of the amended Act by executing a waiver of her *ex post facto* protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments which, as relevant to this case, deleted the statutory presumption in favor of alternative sentencing options afforded defendants convicted of Class C, D, or E felonies. *See* T.C.A. § 40-35-102(6) (2006). As such, the statutes cited in this opinion are those in effect at the time the instant crimes were committed.

When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d) (2003). The burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Comments. This means that if the trial court followed the statutory sentencing procedure, made findings of facts that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing, we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and/or sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; and (6) any statements made by the defendant on his or her own behalf. *See* T.C.A. § 40-35-210 (2003); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration, and an especially mitigated or standard offender convicted of a Class

C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2003). However, because the defendant in this case was convicted of a Class B felony, she is not entitled to the presumption in favor of an alternative sentence. Nonetheless, she remains eligible for an alternative sentence because her sentence was eight years or less and the offense for which she was convicted is not specifically excluded by statute. *See* T.C.A. § 40-35-102(6), -303(a) (2003).

In determining whether a sentence of confinement is appropriate, a trial court should consider whether: (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is needed to avoid depreciating the seriousness of the offense, confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991 (citing T.C.A. § 40-35-103(1)(A)-(C)). The court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 as they are relevant to the section 40-35-103 considerations. T.C.A. § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5) (2003); *Boston*, 938 S.W.2d at 438.

In ordering that the defendant's sentence be served in confinement, the trial court found as follows:

> Based on the proof the Court has heard here today, the Court finds that the defendant's potential for rehabilitation is not good. She has a prior offense of the same type. She committed a similar offense while out on bond for this offense. The Court further finds that after judging her credibility, he cannot see that she genuinely accepts responsibility for this offense. The Court further finds that in order to avoid depreciating the seriousness of the offense and to deter others from similar offenses who are placed in a position of private trust that the appropriate manner of service of the sentence should be in the custody of the Tennessee Department of Corrections.

On appeal, the defendant contends that the trial court's decision to order a sentence of confinement was error because the record does not support the court's conclusions. First, she contends that the court erred not only in finding that the defendant's acceptance of responsibility in regard to her potential for rehabilitation was not genuine but, furthermore, that the potential for rehabilitation should not have been considered at all as it is not one of the three factors the statute prescribes as a consideration for determining if confinement is appropriate. According to the defendant, the "one finding the trial court made which, under the statute, is a consideration for ordering a sentence of confinement, was that confinement was necessary to avoid depreciating the seriousness of the offense and suited to provide an effective deterrence to others." However, she contends that the court failed to explain the basis of that finding, arguing the record does not support the finding because "there was nothing that was extraordinary relative to any other theft of three

hundred thousand dollars." She asserts that "though [she] is to blame for her own criminal conduct . . . , much of the blame for the loss to the corporation should be placed on the corporate president[, the defendant's husband,] who facilitated what [the] defendant was doing. No reasonable corporate officers would have put this defendant in control of all the books and accounts with no oversight and not bothered checking to see if anything was wrong with them for three years" if that person had knowledge of the defendant's prior spending problems and irresponsibility with money. Finally, the defendant argues the court's finding regarding deterrence is not support because no evidence was introduced regarding the deterrent effect of the defendant's incarceration.

Initially, we note that the defendant's contention that the defendant's potential for rehabilitation was not a proper consideration is misplaced. Our case law is clear that this is a valid consideration when determining if an alternative sentence would be appropriate. *See* T.C.A. § 40-35-103(5); *Boston*, 938 S.W.2d at 438. Here the court found that the defendant's potential for rehabilitation was poor based upon her prior similar conviction and because a similar offense had been committed while she was on bond for this case. The commission of those offenses was certainly a valid consideration. Additionally, the court concluded the defendant did not genuinely accept responsibility for her actions but blamed others instead. It has been repeatedly held that a defendant's failure to accept responsibility for his crime reflects poorly on his potential for rehabilitation. *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); *State v. Anderson*, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992); *State v. David Earl Nixon*, No. M2005-01887-CCA-R3-CD (Tenn. Crim. App., at Nashville, Sept. 26, 2006). It was the trial court in this case who heard the testimony presented and was in the best position to judge the credibility of the witnesses. As an appellate court, we defer to the trial court's findings regarding the credibility of witnesses. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). Despite the fact that the defendant pled guilty to the crime and stated she accepted responsibility, we conclude that the record supports the trial court's findings.

Next, we address the defendant's argument regarding the trial court's finding that confinement was necessary to avoid depreciating the seriousness of the offense and that confinement is particularly suited to provide an effective deterrence. With regard to deterrence, the defendant argues that there is no proof supporting the finding in the record. The defendant is correct that our supreme court has repeatedly held that "the record must contain proof of the need for deterrence before a defendant, who is otherwise eligible for probation or other alternative sentence, may be incarcerated." *State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). Although the statute "does not require proof that incarceration 'will' or 'should' deter others from committing similar crimes," the record must demonstrate that "confinement [is] 'particularly suited' to provide a deterrent effect." *Id*. After concluding that the "trial court should be given considerable latitude in determining whether a need for deterrence exists and whether incarceration appropriately addresses that need," our supreme court ruled that a reviewing court

> will presume that a trial court's decision to incarcerate a defendant based on a need for deterrence is correct so long as any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular

> community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

Id. at 10. While we agree with the defendant that the State failed to introduce evidence regarding deterrence, we note that *Hooper* addresses the issue of whether deterrence *alone* may support a denial of alternative sentencing and articulates the criteria for such circumstances. *See State v. Trotter and Sheriff*, 201 S.W.3d 651 (Tenn. 2006). In this case, the trial court also based its denial on the seriousness of the offense and the need to avoid depreciating the seriousness of the offense. If the seriousness of the offense forms the basis for the denial of alternative sentencing, Tennessee courts have held that "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence of confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (citing *State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995); *State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)).

Review reveals that the trial court properly considered the required principles of sentencing and that the record supports a sentence of confinement in this case. We reject the defendant's argument that "there was nothing that was extraordinary relative to any other theft of three hundred thousand dollars" and that the "loss to the victims and everyone it affected could have also been avoided if the officers and owners of the corporation had acted responsibly." The circumstances of the offense are that the defendant, knowing of her serious issues with money, sought out this position and, for a period of three years, knowingly stole approximately $319,000 from her husband's company. By her own admission, she went to great lengths to conceal her actions. As a result of these actions, the company was left on the brink of bankruptcy, with debts to the IRS, vendors, and employees. We conclude that the circumstances of the offense are reprehensible and that the amount of money taken in this case was excessive, as it was over five times the amount required for conviction of this offense. Based upon these facts, we are unable to conclude that the trial court erred in ordering a sentence of confinement in this case.

CONCLUSION

Based upon the foregoing, the sentence of confinement is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE